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In The

Supreme Court of the United States

NELSON and JOAN FERNANDES,
Petitioner(s),

V.

SPARTA TOWNSHIP COUNCIL,
SPARTA TOWNSHIP MANAGER,
SPARTA TOWNSHIP ENGINEER,
Respondent(s).

On Petition for Writ of Certiorari
To The Appellate Division of New Jersey

SUPPLEMENTAL BRIEF

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Supplemental Brief

Waiving its right to file a brief in opposition represents an intervening matter that permits this supplemental brief. ***R***.15.8. It further means Sparta is not disputing the facts and law presented especially Mr. Bolcato's exhaustion admission. Given his lack of candor and truthfulness below, [1] Mr. Bolcata chose to waive his right in this Court. In expectation of a brief in opposition, petitioner reviewed his petition and found that he overlooked the following matters.

Mr. Bolcato made a false statement of law (***RPC*** 3.3(a)(1)) by arguing ***Schiffner*** to bar petitioner's claims,[2] since it holdings apply to the one year time limits in ***R***.4:50,[3] not the fraud upon the court [4] and void judgment issues in this case.[5]

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[1] "Attorney Grievance Comm'n of Maryland v. Middleton, 756 A.2d 565, 573-74 (Md. App. 2000) (upholding state bar's indefinite suspension of a lawyer because of intentional misrepresentations to a court since "candor and truthfulness are two of the most important moral character traits of a lawyer")." ***Baltimore Scrap Corp. v. David J. Joseph Co.***, 237 F.3d 394 (4th Cir. 2001)

[2] "Resort to R.4:50 may not be used as a substitute for appeal as plaintiff attempts herein, see, In re Estate of Schifftner, 385 N.J. Super 37, 43 (App. Div. 2006). " (P3) (6/23/06 order)

[3] "If relief, however, is sought based upon R. 4:50-1(d), (e) or (f) or R. 4:50-1 (fraud upon the court) the complaint shall be filed within a reasonable time under the circumstances. . . . ("It is well established that an R. 4:50 motion may not be used as a substitute for a timely appeal") . . ("The rule may not be used to convert a 'trial error' from which an appeal must be taken within 45 days into a 'mistake' which may be corrected within one year.")" ***In re Estate of Schifftner***, 385 N.J.Super. 37, 41-43 (App.Div. 2006)

[4] "The savings clause to Rule 60(b) further provides "[t]his rule does not limit the power of a court to entertain an independent

Petitioner's independent action to file a ***R***.4:50-1(c) fraud upon the court motion (P46) is modeled after ***Rule*** 60 (b)(3),[6] which allows those prevented from

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action to . . . set aside a judgment for fraud upon the court." This Court reviews a district court's denial of a Rule 60(b) motion for abuse of discretion. . . . **"Parties seeking relief under Rule 60(b) have a higher hurdle to overcome because such a motion is not a substitute for an appeal." "Accordingly, our review is meaningfully narrower than review of the merits of a direct appeal.". "Given the lower court's discretion, the district court's ruling is only reviewed to determine if a definite, clear or unmistakable error occurred below." A reviewing court may reverse only if it finds "a complete absence of a reasonable basis and [is] certain that the . . . decision is wrong." However, "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." . . . . . Fraud between the parties and fraud on the court are two distinct bases for post-judgment relief. "Fraud on the court . . . is fraud which is directed to the judicial machinery itself and is not fraud between the parties . . . ."** Buck, 281 F.3d at 1342. **Fraud on the court claims merit separate analysis not only because they are exempt from the one year time-period for filing claims under Rule 60(b)(3)."** ***Zurich North America v. Matrix Service, Inc.***, 426 F.3d 1281 (10th Cir. 2005).

[5] **"A judgment is void [and thus may be set aside under Rule 60(b)(4)] "only if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law." In re Four Seasons Sec. Laws Litig., 502 F.2d 834, 842 (10th Cir.1974).** Despite the language of Rule 60(b) that all motions for relief must be "made within a reasonable time," a motion under Rule 60(b)(4) may be made at any time." ***In re TEC Resources, LLC***, No. NO-02-056 (10th Cir. 2003).

[6] "R. 4:50-1(c). This rule is modeled after Federal Rule 60(b)(3)." ***Palko v. Palko***, 73 N.J. 395, 400-401 (NJ 1977).

exhibiting fully their case to set aside and annul the former judgment,[7] making it "a continuation of the former suit".[8] Mr. Bolcato's judicial estoppel violation and fraud upon the court requires vacating the 6/23/06 order, 6/14/07 affirmation, and 7/21/04 judgment because they are sufficiently gross so as to require a departure from res judicata [9] achieved by a judicial estoppel violation.[10] His 5/25/06 certification in support of res judicata implicitly certifies the

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[7] "[W]here the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception . . . a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."). "If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action." ***Computer Leasco, Inc. v. NTP, Inc.***, 194 Fed.Appx. 328, 2006 Fed.App. 0670N (6th Cir. 2006)

[8] "Because the action, if successful, would have the effect of vitiating the federal judgments, the action would have been treated as "ancillary" to the earlier federal proceedings in essence, as "a continuation of the former suit" in federal court even if it was formally denominated as an "independent action" for fraud. U.S.v. Beggerly, 524 U.S. 38, 45-46 (1998) (quoting Pacific R.R. of Mo. v. Missouri Pacific Ry. Co., 111 U.S. 505, 522 (1884)). " ***Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,*** No. 07-0065-cv, fn.13 (2d Cir. 2007).

[9] "Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of "inJustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of res judicata. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238, 244 (1944). " ***U.S. v. Beggerly,*** 118 S.Ct. 1862 (U.S. 1998).

[10] ***State of N.H. v. State of Maine***, 532 U.S. 742 (U.S. 2001) (fn. 69 in petition).

7/21/04 judgment is valid, final and on the merits.[11] Petitioner's claims are the result of Sparta's judicial estoppel violation, the judge's misrepresentation of the SDWA issue, and advisory opinions rendered after his dismissal for exhaustion. *Id.* Twenty days later, Mr. Bolcato filed his 6/15/06 trial brief (P59) admitting he argued exhaustion in the former case,[12] which resulted in a dismissal for exhaustion (P28)[13] thereby depriving the court of jurisdiction.[14] So, the judge assumed hypothetical juridsdiction to address

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[11] "The term 'res judicata' refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated." Three elements must be met for res judicata to apply: "[1] the judgment relied upon must be valid, final and on the merits; [2] the parties in the two actions must be either identical or in privity with one another; [3] the claims [in the subsequent case] must grow out of the same transaction or occurrence." "For the purposes of res judicata, causes of action are deemed part of a single 'claim' if they arise out of the same transaction or occurrence." A litigant must present all theories in the first action when seeking to remedy a single wrong. Ibid. ***Hawkins v. Garden State Surgical Assoc., P.A.***, No. A-3952-06T3 (App.Div. 2008) (internal citations ommitted) (emphasis added)

[12] "The Maul case does not support plaintiff's' claim. Sparta raised the Exhaustion issue in its Trial Brief and, as such, plaintiffs were on notice of the issue and had the opportunity to respond to it." (P59).

[13] "The doctrine of exhaustion of remedies is particularly applicable herein. Plaintiffs never pursued their administrative remedies when advised by the Construction Official that they would have to resolve the SDWA fifty foot radius issue before a building permit issued (P28)."

[14] "If a court then determines that it lacks subject matter jurisdiction, it cannot decide the case on the merits. It has no authority to do so." **In re Orthopedic "Bone Screw" Products Liability Litigation**, 132 F.3d 152 (3d Cir. 1997).

the merits, which he is not allowed to do,[15] thereby violating the unreversed law of the case [16] to retroactively nullify the trial.[17] So, Mr. Bolcato misrepresented the 7/21/04 judgment as final and on the merits to achieve the 6/23/06 res judicata ruling (P1-4), knowing he argued exhaustion in violation of the 10/21/03 summary judgment order. Therefore, his admission constitutes a false statement of law with respect to ***Maul***.

The 6/15/06 trial brief (P59) provides the degree of formality needed to be binding on trial and appellate courts.[18] In it, Mr. Bolcato admits to arguing exhaustion to meet petitioner's ***Maul*** argument, which requires notice when the law of the case is affected, thus making his admission

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[15] "The Supreme Court has held that courts may not assume "hypothetical jurisdiction" to resolve a case on the merits. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101--02 (1998). In other words, an actual determination must be made whether subject matter jurisdiction exists before a court may turn to the merits of a case. " ***Malaysia International Shipping Corp. v. Sinochem Inter. Co. Ltd.***, 436 F.3d 349 (3d Cir. 2006).

[16] ***Williams v. Runyon***, 130 F.3d 568 (3d Cir. 1997). (fn.33 in petition)

[17] ***Bouie et al. v. City Columbia***, 84 S. Ct. 1697, 378 U.S. 347 (U.S. 1964) (fn. 24 in petition)

[18] "In order to constitute a judicial admission that is binding on both the trial and appellate courts, an attorney's statement must have a fair degree of "formality"; i.e., it must be done in writing or in open court and amount to a real concession of a fact at issue, and not have been made merely as a concession for some unrelated purpose. American Title Ins. Co. v. Lacelaw Corp.,861 F.2d 224, 226, 227 (9th Cir. 1988). " ***United States v. Novak***, 99 F.3d 1147 (9th Cir. 1996) (emphasis added)

conclusive.[19] So, petitioner was not required to provide further proof, whereas, the trial court was required to accept his admission "as if established by the clearest proof".[20] Hence, failure to address an admitted judicial estoppel violation to avoid restoring the right to a trial requires this Court to correct it.[21]

Mr. Bolcato twice violated judicial estoppel to perpetrate frauds upon the court.[22] First, by arguing exhaustion to effect a lack of jurisdiction dismissal contrary to the unreversed 10/21/03 order. Then,

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[19] "A judicial admission, deliberately drafted by counsel for the express purpose of limiting and defining the facts in issue, is traditionally regarded as conclusive, and an admission under Rule 36 falls into this category."*fn9 6 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2264, at 742-43." ***Airco Industrial Gases Inc. v. Teamsters Health and Welfare Pension Fund of Philadelphia and Vicinity***, 850 F.2d 1028 (3rd Cir. 1988)

[20] "When a party has admitted to a fact, the opposing party may "dispense with proof of facts for which witnesses would otherwise be called" as to that issue, and "any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." Oscanyan v. Arms Co., 103 U.S. 261, 263 (1880)." ***Philadelphia Reinsurance Corp. v. Employers Insurance of Wausau,*** 61 Fed.Appx. 816 (3d Cir. 2003)

[21] (This Court should correct questions of law erroneously decided that result in confiscation) ***Clark's Ferry Bridge Co. v. P.S. Comm. Pa.,*** 54 S. Ct. 427, 291 U.S. 227 (U.S. 1934)

[22] "Fraud upon the court" is narrowly construed. It has been found only in those instances where the fraud vitiates the court's ability to reach an impartial disposition of the case before it. "Fraud on the court must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision," preventing the opposing party "from fully and fairly presenting his case." ***Davenport Recycling Assoc. v.a Comm. of I.R.S.***, 220 F.3d 1255 (11th Cir. 2000), (internal citations ommitted)

claiming the lack of jurisdiction was a dismissal on the merits in this case. Hence, he used the advisory opinion rendered after the judge assumed hypothetical jurisdiction to support his position. So, the judge's advisory opinion represents action taken in bad faith, contrary to the law of the case in conscious excess of jurisdiction, or for a corrupt or improper motive since the judge knew Sparta admitted exhaustion.[23] So, res judicata and the subsequent affirmation were the result of Mr. Bolcato's second fraud on the court.

Plain Error Standard of Review

The Fourth Circuit applies ***Olano*** to civil cases for plain errors which effect substantial rights when it can conclude, "after examining the particulars of the case, that the error seriously

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[23] **"Essentially two types of judicial acts fall within the scope of bad faith: (1) "intentionally committed acts which [the Judge] knew or should have known were beyond [the Judge's] lawful power" and that involve "actual malice as the motivation for a Judge's acting ultra vires"; and (2) intentionally committed "acts within the lawful power of a Judge which nevertheless are committed for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties." (willful misconduct in office "implies or requires actions taken in bad faith, contrary to law or in conscious excess of jurisdiction, or for a corrupt or improper motive.").** "The lesser included charge of conduct prejudicial [to the administration of Justice] connotes 'conduct which a Judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office' as well as wilful misconduct out of office, ..." Gonzalez v. Commission on Judicial Performance, 657 P.2d 372, 373-74, 188 Cal. Rptr. 880 (Cal. 1983), quoting Geiler, 515 P.2d at 9, n.11." ***In re Jett,*** 882 P.2d 414, 180 Ariz. 103 (Ariz. 1994)

affects the fairness, integrity or public reputation of judicial proceedings." [24] An error is clear or obvious when the settled law of the Supreme Court or a Circuit Court establishes that an error has occurred. *Id.* This Court finds an important question of procedural due process is raised under the Fourteenth Amendment when there is a denial of a fair hearing under state law.[25] It will also address a claim of judicial misconduct when the judge's behavior was so prejudicial that it denied a fair, as opposed to a perfect, trial." [26]

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[24] **"This court has held that the approach set out by the Supreme Court in Olano should also be applied in civil cases.** ("Before we can exercise our discretion to correct an error not raised below in a civil case, at a minimum, the requirements of [Olano] must be satisfied."), **Under the Olano standard, there must be an error, that error must be plain, and the error must affect the appellant's substantial rights. See Olano, 507 U.S. at 732. . . ("If the forfeited error is plain and affects substantial rights, the court of appeals has authority to order correction, but is not required to do so.") . . . We should exercise our discretion to correct the error only if we can conclude, "after examining the particulars of the case, that the error seriously affects the fairness, integrity or public reputation of judicial proceedings." ("To be plain, an error must be clear or obvious . . . An error is clear or obvious when the settled law of the Supreme Court or this circuit establishes that an error has occurred. In the absence of such authority, decisions by other circuit courts of appeals are pertinent to the question of whether an error is plain.")"** ***Brickwood Contr., Inc. v. Datanet Eng., Inc.***, 369 F.3d 385 (4th Cir. 2004)

[25] "If meanwhile she was denied a fair hearing under state law, an important question of procedural due process is raised under the Fourteenth Amendment." ***Tarver v. Smith***, 402 U.S. 1000, 1003 (U.S. 1971) (fn. 84 in petition)

[26] In reviewing a claim of judicial misconduct, "we must determine whether the judge's behavior was so prejudicial that

Petitioner's opening brief quotes; State, Circuit, and Supreme Court rulings proving numerous plain errors in both cases.[27] Moreover, petitioner proved Mr. Bolcato violated judicial estoppel to perpetrate a fraud upon the court and pleaded judicial estoppel in his 4/20/06 complaint (P46),[28] which prompted Mr. Bolcato to again violate judicial estoppel to prevent petitioner from being heard in this case, as well.

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it denied [defendants] a fair, as opposed to a perfect, trial ***U.S. v. Gurary***, 860 F.2d 521 (2nd Cir. 1988).

[27] In the state court, petitioner apparently attacked the trial judge's ruling as an abuse of discretion, not as a deprivation of his constitutional rights. While it is true that, as a general matter, this Court will not review federal constitutional issues that have not been raised in state court, this rule is not absolute. When the record in a case has revealed plain error, this Court has enforced federal constitutional standards despite the petitioner's failure to raise clearly his federal constitutional claim in the court below. ***Williams v. Florida***, 104 S. Ct. 1617, 465 U.S. 1109, 1112 (U.S. 1984)

[28] Recent decisions do indicate that an appellate court can raise the doctrine of judicial estoppel on its own motion if confronted with an especially egregious case wherein a party has successfully asserted a directly contrary position. Absent a flagrant threat to the judicial process, however, we will not disregard the waiver produced by a failure to plead judicial estoppel in conformity with Federal Rule of Civil Procedure 8(c). ***U.S. v. C.I.T. Constr. Inc. of Texas***, 944 F.2d 253 (5th Cir. 1991) (internal citations ommitted)